COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
DOCKET NUMBER: 2014-SC-000526

MARSHALL PARKER **APPELLANT**

COURT OF APPEALS
VS. DOCKET NUMBER: 2013-CA-001978-WC
WCB NUMBER: 09-99663

WEBSTER COUNTY COAL, LLC (DOTIKI MINE),
HON. STEVEN G. BOLTON AND
WORKERS COMPENSATION BOARD **APPELLEES**

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APPELLANT'S REPLY BRIEF

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing was sent by overnight mail to the Clerk of Supreme Court of Kentucky, Capital Bldg., Room 235, 700 Capital Ave., Frankfort, KY 40601 and copies were served by Priority US mail, to Kentucky Court of Appeals, Sam Givens, Clerk, 360 Democrat Drive, Frankfort, KY 40601- 9229, Hon. Steven G. Bolton, ALJ, Department of Workers' Claims, 657 Chamberlin Avenue, Frankfort, Kentucky 40601; Workers' Compensation Board, Office of Workers' Claims, Prevention Park 657 Chamberlin Avenue, Frankfort, KY, 40601, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601-3449; and Stanley S. Dawson, Esq., Fulton & Devlin, LLC, 1315 Herr Lane, Suite 210, Louisville, KY 40222, this 9th day of February 2015.

Respectfully submitted,

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ARGUMENT

I. EQUAL PROTECTION

A. Other States' Rulings

Mr. Parker has cited legal authority from other jurisdictions to show that most support Mr. Parker's position, either in whole or in part. Either the decisions refute the "duplication of benefits" argument or they demonstrate that at least the injured worker should get compensation that is based upon permanent physical injury. Kentucky is one of only a few states that have upheld the constitutionality of a Social Security offset based upon the duplication of benefits analysis. And even in the states where offset provisions have been upheld, most of those states have offset provisions different than Kentucky's. Most do not allow the offset against compensation for physical impairment when that is a separate element of their compensation system. And some allow only a partial offset to take into account the employee's contributions to the social security system. For instance, Pennsylvania only offsets 50% of the social security benefit to be applied as an offset and not against the permanent injury component.[1]

The states that prohibit or at least limit the offset are the majority of jurisdictions, even without considering those states that simply have no offset provision at all. When reviewing all the state decisions mentioned in the various opinions from around the country, the only states cited as having a complete offset such as ours, that has not been invalidated, are Tennessee, Washington,

[1] Pennsylvania statute is 306(c), 77 P.S. sec. 513.

and Maine.[2] Massachusetts allows a total offset but not if the employee intended to continue to work beyond eligibility for social security, as is the case with Mr. Parker.[3] There are at least a couple more states that have complete offset provisions but they are not mentioned in other states' opinions, apparently because the issue was not decided on the merits.[4] In almost all other states, a person in Mr. Parker's situation would still receive some or all of his benefits.

Appellee has questioned the citation of the Kansas cases in Mr. Parker's brief, *Dickens v. Pizza Company*, and *Hoesli v. Triplet*.[5] They are cited because in *McDowell v. Jackson Energy RECC,* the Kentucky Supreme Court cites to Kansas law when deciding the issue.[6] The Kansas cases, *Dickens* and *Hoesli* based their decisions on whether workers compensation and social security benefits were duplicative, the same analysis most states use in determining constitutionality of an offset provision. The constitutional issue was not reached because the Kansas court determined a legislative intent to only offset if there was duplication of lost wage benefits. They found that there was no duplication and denied the offset without needing to reach the equal protection argument. Without duplication of benefits, the statute would not have passed constitutional muster by the analysis proffered by Appellee.[7]

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[2] *Vogel v. Wells Fargo Guard Services*, 937 S.W.2d 856 (Tenn. 1996), *Harris v. State Department of Labor and Industries*, 120 Wash.2d 461, 843 P.2d 1056, 1066 (Wash.1993), *Berry v. H.R. Beal & Sons*, 649 A.2d 1101 (Me.1994), *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla.1984).

[3] Massachusetts General Laws c. 152, § 35E.

[4] See for instance *Weeks v. North Dakota Workforce Safety & Ins. Fund*, 803 N.W.2d 601 (N.D. 2011).

[5] *Dickens v. Pizza Company*, 974 P.2d 601 (Kan. 1999), *Hoesli v. Triplet*, 109, 448 (Kan. App. 2014).

[6] *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002).

[7] Appellee brief pg. 6-7, espousing "...workers compensation benefits are still a substitute for earned income."

Appellee has made the argument that workers compensation and social security benefits are duplicative, much as some court decisions have done. And understandably it does not argue other bases for the constitutionality of the offset provision.[8] Because duplication of benefits is the analysis that determines the outcome in each of these decisions, all cases performing this analysis are important in this matter. Each of the cases cited by Mr. Parker in his initial brief discusses the relative merits of the proposition.

B. Kentucky Cases

Appellee is correct that K.R.S 342.730 has been determined to be constitutional in recent years. *McDowell v. Jackson Energy* and *Keith v. Hopple Plastics* both uphold the social security offset but by the thinnest of margins, four justices to three.[9] The issue is not settled in all minds.

C. Rationale for Change

1. Statute States It Is Not Compensating for Lost Wages

One of the most persuasive arguments for Mr. Parker's position was alluded to in the dissenting opinion in *Keith*. K.R.S. 342.011 says that all the payments made to employees in the system will be called income benefits. But for the type of award Mr. Parker received, there is no lost income according to the statute. It is a little hard to follow but K.R.S. 342.730 (1) (b) says that for all

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[8] See *Sasso v. Ram Property Management*, 452 So.2d 932 (Fla. 1984), stating "To induce older workers to retire to allow younger workers a chance to advance in their employment."

[9] *McDowell v. Jackson Energy RECC*, 84 S.W.3d 71 (Ky. 2002), *Keith v. Hopple*, 178 S.W.3d 463 (Ky. 2005).

permanent partial awards, the benefits are calculated as set forth in that section. Then K.R.S. 342.730 (1) (c) says that if the employee does not retain the capacity to return to work at his pre-injury wage level, the calculation in section (b) must be multiplied by three. But if the employee can return to his former level of employment, the calculation from section (b) is the entire award. So if the administrative law judge finds that there is no wage loss, the employee still gets the award for permanent physical injury as calculated under section (b).

This is the type of award Mr. Parker received. He had no wage loss according to the judge but did have a permanent physical impairment for which he was entitled to compensation. And if his workers compensation award was not wage loss replacement, social security could not be duplicative wage loss replacement.

2. Social Security and Workers Compensation Are Not Welfare

In the *McDowell* opinion, Justice Cooper refers to Social Security Benefits and Workers Compensation Benefits as "welfare benefits." Since about half of the money funding Social Security Retirement Benefits is deducted from the employees' paycheck, it easy to see why this is a lonely opinion. Nearly every other state recognizes that Social Security Benefits are at least partially earned by the employee.

Kentucky workers paid for workers compensation benefits by impliedly waiving their common law tort rights.[10] This tradeoff has been around for about

[10] *McLain v. Dana Corp.*, 16 S.W.3d 320 (Ky. App. 1999).

100 years, and since no authorities or politicians are suggesting that industry needs to reverse this trade, it must be a pretty good deal for employers. So the sacrifices made by workers ought to be recognized as valuable consideration for the benefits that have resulted.

3. Cost Savings Alone Is Not Enough

The argument made by Appellee concerning cost savings is an incomplete analysis. Cost savings, by itself, can't justify legislative action that singles out a particular group. The simple reason is because any cuts to any awards would save money. You have to justify burdening a particular segment of the citizens rather than spreading the cost over the entire population. Paraphrasing this Court's opinion in *Vision Mining v. Gardner,* it is axiomatic that if the cuts applied to every worker, the system would save even more money.[11]

II. DUE PROCESS

Aside from the equal protection arguments for invalidating the statute, due process concerns are also at play. The workers compensation statutes are only constitutional to the extent that it is fair to deem workers common law rights waived in return for the benefit received.[12] The Kentucky Supreme Court's reasonable presumption of consent requirement is not met for workers in Mr. Parker's position. They are subject to the workers compensation offset provision in KRS 342.730(4) and receive only two years of disability benefits and medical

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[11] *Vision Mining v. Gardner,* 364 S.W.3d 455, (Ky. 2011).
[12] *McLain v. Dana Corp.*, 16 S.W.3d 320 (Ky. App. 1999), *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975).

coverage. The medical coverage is superfluous due to Medicare or the mandatory coverage every person is now required to have. The tradeoff for tort rights has gone from disability benefits and medical coverage to simply two years of disability coverage. That trade is so one-sided, it is no longer reasonable to presume the employee is consenting.

III. ECONOMIC IMPACT

A. What is this Court Being Asked to Decide?

The answer to this question bears directly on the economic impact on the Court's ruling in this matter. There are four types of awards in workers compensation; Total Temporary Disability which is commonly called lost wages, Total Permanent Disability, Permanent Partial Disability without the ability to return to the former work, and Permanent Partial Disability with the ability to return to the former work. In this case, Mr. Parker was awarded a Permanent Partial Disability award without a multiplier. That means that this case is not about Permanent Total Disability or even Permanent Partial Disability awards that include the multipliers based upon the claimant's inability to return to his prior employment. This Court may decide to rule more broadly but the arguments are different for cases with each type of award and the economic impact is certainly different.

The size of the awards and thus the economic impact is a function of the amount paid and the duration of the payments. If Mr. Parker prevails, the award he would receive, Permanent Partial Disability without multipliers, will have much less impact on the employers and insurance companies than if the offset

provision is determined to be unconstitutional for all awards. The Permanent Total Awards presently pay up to $35,000 per year to the claimant who is a maximum wage earner. KRS 342.730(4) terminates the award at age 67. If the court rules that the statute is unconstitutional for this type of benefit, those payments could continue for decades. On the other hand, Permanent Partial awards terminate after 425 or 520 weeks, no matter how long the claimant lives. So the Permanent Partial awards are much shorter in duration than Permanent Total awards.

Permanent Partial awards without a multiplier are also smaller weekly payments. These awards are by definition a fraction of the other class of Permanent Partial awards. They are 1/2 or 1/3 the amount of awards in which the claimant can't return to his former job.

B. Who is the Ruling Going to Affect?

The claimants who would benefit from a favorable ruling for Mr. Parker are only those workers of advanced years. Younger and middle age workers will see their Permanent Partial benefits expire before any Social Security offset could make a difference. So only a small segment of the workforce may receive additional benefits as a result of a favorable ruling in this case. According the 2008 Economic Report for Kentucky, only 3% of the Kentucky workforce was over the age of 65, the group most likely to benefit from a ruling for Mr. Parker in this matter.[13]

[13] 2008 Economic Report for Kentucky prepared and published by Kentucky Education and Workforce Development Cabinet, August 11, 2009.

A limited ruling will affect a small segment of the workforce and only for the claims that are a tiny fraction of the payout of the other types of claims. The additional benefits awarded to all affected workers as a result of a ruling for Mr. Parker would be a tiny percentage of total benefits paid.

To get some idea of how the workers compensation industry is performing, we can look at the annual reports of at least one Kentucky workers compensation insurance company. Kentucky Employers Mutual Insurance Authority, d/b/a Kentucky Employers Mutual Insurance "KEMI", is a de jure municipal corporation and political subdivision of the Commonwealth of Kentucky. It was established by state law on April 4, 1994 to serve as a competitive state fund to provide a market of last resort for employers and to increase competition in the voluntary market.[14] KEMI writes workers compensation insurance for Kentucky employers and competes with several private insurance companies in the same market.

For 2012 the result of operations yielded a net operating gain of $13,703,467.00. The policyholder's surplus (mostly consisting of accumulated operating profits) increased more than $13 million dollars from the end of 2011 to the end of 2012, reaching a grand total of $173,093,313.00. That net operating gain was after dividends to policyholders in the amount of $4,698,329.00.[15] In 2013, the policy holders' surplus ballooned to $196,376,541.00, largely due to a net income for the year of $23,250,975.00. From that net income, $6,428,792.00 was refunded to policy holders as a policy

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[14] Kentucky Employers' Mutual Insurance Annual Report 2012 published on its website KEMI.com.
[15] *Id.*

dividend. And at the same time small businesses had a decrease in their workers compensation premiums of 40% over the prior years.[16]

While the insurance industry has been cutting premiums and paying policyholders dividends, it has been making huge profits. There is nothing wrong with making money but the facts cited fly in the face of arguments contending that cost cutting is needed to save the workers compensation system. Surely the companies will be adequately prepared for a small increase in the number of awards for Permanent Partial Impairment since they are of limited duration and of lowest value under our workers compensation system.

IV. STARE DECISIS

Mr. Parker is asking for a change in the law but he is only asking for the smallest step to be taken away from *McDowell* and *Keith*. The Court may strike down the statute for all persons and all awards but Mr. Parker's case presents an opportunity to take the most gradual route to changing the law. And since this Court's past decisions were four to three, Kentucky is on notice that the past decisions may not stand forever. Mr. Parker is asking that they change today.

[16] Kentucky Employers' Mutual Insurance Annual Report 2013 published on its website KEMI.com.

Respectfully submitted,

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